SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 187.

JOSEPH S. KAUFMAN, PLAINTIFF IN ERROR,

vs.

W. T. TREDWAY, TRUSTEE OF THE ESTATE OF GUSTAVE KAUFMAN, BANKRUPT.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF PENNSYLVANIA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE AND QUESTIONS INVOLVED.

On the 20th day of August, 1898, Gustave Kaufman filed his petition for adjudication in bankruptcy, and in due course was so adjudged. Prior to this date he had been engaged in the business of contracting, and for about a year previously his principal job or work was a subcontract for the paving of a boulevard in the city of Pittsburg amounting to some $90,000, for which he was paid on monthly estimates of work done, approved by the city authorities. He suspended operations on the 7th or 8th of August, 1898, and did not resume.

To carry on his operations he had borrowed money from time to time, and in July preceding had applied to J. S. Kaufman, his brother, living in the same city, but having no business connections or relations with him, for advances on his next estimate expected between the 2d and 6th of August.

J. S. Kaufman accordingly advanced to him July 7 $200, July 22 $100, and July 29 $1,500, making total advances of $1,800 on his promise to repay the same out of his next estimate.

On August 4 Gustave Kaufman received his estimate and returned to J. S. Kaufman therefrom on account $1,086.64. Four days later he, being then in financial straits, came back to J. S. Kaufman and asked a return of $767 of the $1,086.64 last paid, with which to pay wages due laborers on his work or contract. Said sum was given him as requested.

Suit was brought by trustee of the bankrupt to recover *inter alia* the whole of the amount given on August 4 to the appellant, on the ground that the appellant, at the time he received the same, had reasonable cause to believe that Gustave Kaufman was a bankrupt, and that appellant was receiving a preference thereby, in violation of the provision of the bankruptcy act relating to preferences.

A verdict was rendered against appellant for $1,309.94, being the amount of said claim with interest to date of verdict, and, after new trial refused, judgment was entered on the verdict, which judgment the Superior Court of Pennsylvania affirmed, first striking off a part of the interest allowance, by which said verdict was reduced to $1,246.49. From this ruling the plaintiff in error appeals.

There are three questions involved in this controversy:

(1.) Was the payment of $1,086.64 made August 4, 1898, by the debtor to the plaintiff in error a voidable preference

within the meaning of the 60th section of the bankrupt act of 1898?

(2.) Was the plaintiff in error entitled to set off the $767 returned by him to debtor on August 8, 1898, under clause (c) of said section?

(3.) Was interest chargeable in any event on payment of August 4, 1898?

If the first question be decided in the negative, such decision will render the second and third questions unimportant.

ASSIGNMENTS OF ERROR.

First. The Superior Court of Pennsylvania erred in entering judgment against the plaintiff in error, and thereby affirming the judgment of the court below.

Second. The Superior Court of Pennsylvania erred in not entering judgment in favor of the plaintiff in error and in not reversing the judgment of the court below.

Third. The Superior Court of Pennsylvania erred in refusing to allow to the plaintiff in error his claim that, under clause (c) of section 60 of the act of Congress of July 1, 1898, known as the bankruptcy act, he was entitled to a set-off to the claim of the defendant in error amounting to $767.

Fourth. The Superior Court of Pennsylvania erred in finding that the plaintiff in error received a preference from the bankrupt as defined by section 60 of the said bankruptcy act when he was paid by the bankrupt the sum of $1,086.64 on August 4, 1898, and in holding him liable therefor to the defendant in error for the amount of the said payment.

Fifth. The Superior Court of Pennsylvania erred in its opinion as follows:

> "The evidence as to the defendant's knowledge of the financial condition of the bankrupt was somewhat detailed and covered a considerable portion of time prior to the alleged preference and the adjudication in bankruptcy. The plaintiff offered testimony of a witness as to an interview had by him with the bankrupt and the defendant, in January, previous to the adjudication in regard to the financial condition of the bankrupt, for the purpose of showing (1) the bankrupt condition of Gustave Kaufman, and (2) the knowledge of Joseph S. Kaufman of his bankrupt condition. This was objected to and the offer admitted under objection and the admission assigned for error. If the testimony had been of a single transaction over seven months prior to the alleged preference, and there had been nothing to show a continuing knowledge by the defendant of the affairs of the bankrupt, the objection might have had some validity as being remote and disconnected from the alleged bankruptcy, but other events tended to show that from that time down to the date of the payment, which constitutes the alleged preference, the defendant had more or less intimate connection with and knowledge of the affairs of the bankrupt, including an assignment to him and others of all the bankrupt's property in May or June of the same year. We think the evidence, under the circumstances, was properly admitted, and that it and all the other facts tending to show that the defendant had reasonable cause to believe that the payment to him was intended to give a preference were fairly submitted to the jury. Their finding upon that subject was conclusive and the preference was established."

Sixth. The Superior Court of Pennsylvania erred in its opinion as follows:

> "In order to entitle the defendant to successfully set off the payment of $767 against the money received by him, it was necessary for him to show that

the amount he sought to set off had become a part of the debtor's estate. Does this testimony show it? We cannot see that it does. The money was advanced for the express purpose of making certain specific payments. Whether it was applied or not does not appear. If the money had been applied to preferred claims under the act and the amount for distribution by the trustees had been thereby increased, the estate of the bankrupt would have been to that extent indirectly benefited, but this does not appear, and it seems to us that it was necessary for the defendant to show specifically that the payment became 'a part of the debtor's estate,' in order to entitle him to use it as a set-off. This was not shown, and we cannot, therefore, convict the court of error in refusing to say to the jury that the set-off was established. The court below, in the opinion refusing a new trial, said: 'This $767 did not literally become a part of the bankrupt's estate. Evidence that the debtor got the money for another purpose certainly is not evidence that he turned it over to the trustee. The most that defendant can ask,—and this we would probably hold,—is that money shown to have been given and used to pay a preferred debt would entitle the defendant to a set-off.' It would, of course, not be necessary to show distinctly that the money was turned over to the trustee, but it was necessary to show that the estate was benefited in some way by the payment. This was not shown clearly; indeed, it does not affirmatively appear that the estate was in any way benefited directly or indirectly. The first assignment, therefore, is overruled."

Seventh. The Superior Court of Pennsylvania erred in holding the plaintiff in error liable to the defendant in error for interest in any amount whatsoever.

ARGUMENT.

The 1st, 2d, 4th, and 5th assignments of error may be grouped and argued under the

First Proposition.

THE PAYMENT OF $1,086.64 MADE AUGUST 4, 1898, BY THE DEBTOR TO THE PLAINTIFF IN ERROR WAS NOT A VOIDABLE PREFERENCE WITHIN THE MEANING OF THE 60TH SECTION OF THE BANKRUPT ACT OF 1898, AND THE TRIAL JUDGE SHOULD HAVE TAKEN THE CASE FROM THE JURY.

Most of the testimony is undisputed. J. S. and Gustave Kaufman were brothers, not living together, engaged in distinctly separate businesses, and totally unconnected in any business deals or enterprises.

Gustave Kaufman was in the contracting business. He had a large subcontract for city paving. He was paid near the first of each month for the estimated value of the work of the preceding month, with the usual amount held back until completion. The labor necessarily constituted a large percentage of the cost and had to be paid as the work proceeded. He found it necessary to borrow money from time to time.

In May, 1898, several of his brothers, including J. S. Kaufman, endorsed a note which he had discounted giving them an assignment of his plant as collateral security, and J. S. Kaufman had also endorsed a note for $3,000 which was discounted at Holmes' bank. The former note was paid in part after the bankruptcy of Gustave Kaufman by sale of the collateral, and the latter note was paid by Gustave Kaufman on August 4, 1898, its maturity date, by check improperly made to J. S. Kaufman and by him endorsed and de-

ivered by Gustave or his employee to the bank. These notes nd payments are not now in controversy.

During July, Gustave was in need of ready money and J. S. Kaufman loaned or advanced him during that month $200, $100, and $1,500, making $1,800 in all, and Gustave promised to repay these advancements when he secured his August estimate from the city, which would be due the first of the month. He got this estimate or payment on the 4th. Same day he paid off the note of $3,000 already mentioned and paid back to J. S. Kaufman $1,086.64 of the $1,800 advanced. No reason appears for the odd sum or for not paying the full amount, but we may well infer that such part payment exhausted the estimate, because on the 8th, or four days later, he came to J. S. Kaufman and requested a return of $767 of the amount paid on August 4 with which to pay some unpaid wages. This money was given back to him for that purpose.

He then ceased operations on the work and on August 20 filed his petition in bankruptcy. At that time J. S. Kaufman had been paid on account of his claim of $1,800 $1,086.64, less $767, or $319.64. But the trustee of Gustave Kaufman, W. T. Tredway, brought suit against J. S. Kaufman, plaintiff in error, for the $3,000, now out of the case, and for the $1,086.64 paid August 4, and alleged that such payments were not only preferences but voidable preferences, because J. S. Kaufman knew or had reasonable grounds to believe that Gustave Kaufman was a bankrupt at the time of payment.

The bankrupt act was passed and went into effect July 1, 1898. Section 60 of said act is as follows:

> "SECTION 60. (a.) A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any

one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

"(*b*.) If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication and the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value, from such person.

"(*c*.) If a creditor has been preferred and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him."

Applying this section to the facts of this case as disclosed by the evidence, the payment of $1,086.64 made by Gustave Kaufman to J. S. Kaufman on August 4, 1898, would seem to be a preference. While the evidence is not conclusive, the books not produced and no statement of the debtor's condition shown as of that date, yet the evidence was probably sufficient when undisputed to warrant the conclusion that he was insolvent at the date of the said payment, and such payment was therefore a preference within the meaning of the act, and it was less than four months before the filing of the petition in bankruptcy. But this would not enable the trustee to recover unless such preference was voidable, and it was not voidable unless at the time it was given J. S. Kaufman, who received the payment, in the words of the act, "had reasonable cause to believe that it was intended thereby to give a preference."

We maintain that no such reasonable cause appears in the testimony.

On August 4, 1898, there does not appear anything in the testimony that was calculated to cause J. S. Kaufman to believe or even suspect that Gustave Kaufman was insolvent. The transactions of that day were, first, the one complained of, the payment of $1,086.64, and, second, the knowledge brought to J. S. Kaufman that Gustave Kaufman had other money, and was paying and apparently able to pay a maturing note of $3,000.

These payments were made by Gustave Kaufman, by his book-keeper, to J. S. Kaufman and to the bank. J. S. Kaufman and Gustave Kaufman were not together at all on that date, and there is not a word or deed recited in all the evidence that conveys the semblance of suspicion against the solvency of Gustave Kaufman. There were no suits, no obligations gone to protest, no creditors demanding claims—absolutely nothing to cause the slightest suspicion in the mind of J. S. Kaufman against Gustave Kaufman's ability to pay. On the contrary, there was the most powerful and convincing testimony in his favor, viz., the actual payment to him direct of a large sum and the knowledge of a much larger sum being paid to the bank in full payment of the only outside debt of Gustave Kaufman of which J. S. Kaufman had knowledge, except the family note of $6,000, hereafter considered, and which was secured by collateral.

To the mind of J. S. Kaufman, Gustave Kaufman was rapidly paying off his debts in cash, the money coming as his due from the city; and, far from suspecting his insolvency, J. S. Kaufman, had he been suspicious before, would have had those suspicions allayed by all the transactions and assurances of that day.

The $1,800 had been advanced on the strength of the next estimate which would be paid Gustave Kaufman the first week in August. Equitably that estimate, or so much thereof as would pay the debt, was assigned to J. S. Kaufman to secure the loan. The advancements and subsequent part payment were the same transaction. When that payment

was made, it was just what he expected and just when he expected it. It met his expectations in every particular save that it was not in full, and a reason for its not being in full appeared when the knowledge of the further payment of $3,000 the same day appeared by which the liabilities of Gustave Kaufman, so far as known to J. S. Kaufman, were reduced almost one-half. Beyond all question, therefore, if J. S. Kaufman had any reasonable cause to believe Gustave Kaufman insolvent on August 4, he must of necessity have acquired his grounds for the belief prior to that date, and his testimony (pp. 32 and 33) to the effect that on that date at the time of payment he had no knowledge of any insolvency on the part of Gustave Kaufman is strictly and absolutely true and correct.

The next preceding transaction that could influence the belief of J. S. Kaufman was the advancements of $200 July 7, $100 July 22, and $1,500 July 29. There is not a word in the evidence that has a suspicious sound in connection with these transactions. J. S. Kaufman knew the character of Gustave Kaufman's contract, to carry on which and pay labor and other bills required large amounts of cash. The first two amounts were small and the last was only to be for a few days—less than a week—until the August voucher should be received. The requests for these advances were not unusual, not suspicious.

The fact that J. S. Kaufman granted them showed his confidence and freedom from any suspicion. No fact anywhere suggested insolvency or danger of insolvency. The work was progressing, money was being earned and received by Gustave Kaufman. There were no creditors pressing or that could press within J. S. Kaufman's knowledge, and there was manifestly nothing in these advancements or their subsequent part payment that ought to have aroused suspicion in the mind of any reasonable man that Gustave Kaufman was insolvent.

The next preceding occurrence was the endorsement by

J. S. Kaufman and other brothers of a note for $6,000 for Gustave Kaufman about May 19. It was agreed among them at Gustave Kaufman's suggestion that he should give collateral for payment of this note in the shape of an assignment of certain property, as appears in Exhibit 6 printed herein at page 38. It was left to William Kaufman, one of the endorsers and a practicing attorney, to prepare this assignment, which he subsequently did, and it was signed by Gustave Kaufman on June 30.

Exhibit 6 was not and did not purport to be an absolute assignment or an assignment of all the debtor's property. It comprehended such property as is not often pledged as collateral which the brothers of the debtor were willing to accept, leaving free any other property he might have, real or personal. In fact, it clearly appears that the brothers, including J. S. Kaufman, had no anxiety about or fear of loss on the note because the preparation and execution of the paper, Exhibit 6, was delayed and not insisted upon from May 19 to June 30, and then only executed as a matter of form. Therein appears throughout the utmost confidence in Gustave Kaufman and his solvency.

At the conference on May 19, Gustave Kaufman told his brothers, as J. S. Kaufman testified, "that he was short of working capital, always had to wait until estimates came in, and that if he had some ready money he could get along so much better; and after consultation, after considerable argument in which he told us that he was in first-class shape, we agreed to endorse for him for six thousand dollars, taking as collateral security this paper" (Exhibit 6). This is the undisputed testimony (pp. 31 and 32) and it is supported and corroborated by that of William Kaufman (pp. 38 and 39).

The cross-examination of J. S. Kaufman (p. 34 *et seq.*) only emphasized this and developed the fact that J. S. Kaufman was not in touch with his (debtor's) affairs (p. 34), that there was no question or suggestion of a preference, no exhibition

of books or accounts of debtor that indicated bad financial condition, and that the collateral assignment did not, to the knowledge of J. S. Kaufman, include all the debtor's property. It also developed that J. S. Kaufman knew that the contract amounted to about $80,000 or $90,000, which was the basis of the monthly estimates and payments.

Whether or not Gustave Kaufman's statements of his financial condition to his brothers were or were not true can have no bearing on the case. No evidence appears that they had ever found him untruthful. His request was not unusual or unreasonable. The reasons given were plausible and business-like. He seemed in good financial shape. He further averred it. No suspicious circumstance appeared. He had a large and presumably profitable city contract. Payment, if slow, was sure and certain. He had proven himself competent by six or eight months' work, which had been approved and paid for in part. The work was proceeding with expedition. He apparently had no debts; at least no creditors were pressing. He had had some misunderstanding with Keeling & Ridge in January, but that was long past, and that firm was shipping materials right along and J. S. Kaufman had not been appealed to for help in that regard.

Clearly and undoubtedly it would have taken a very suspicious man to doubt the solvency of Gustave Kaufman at that time. None of his brothers did so doubt it. None of his creditors, so far as known, questioned it. J. S. Kaufman, as he testifies, believed it, and it is submitted that the transaction, under the circumstances shown, had in it none of the elements of suspicion, much less belief, that Gustave Kaufman was then in an insolvent condition, and there was not and could not be in this May transaction anything which might give J. S. Kaufman "reasonable cause to believe that he was obtaining a preference" by the payment of August 4. To find a basis for such a belief one must go outside any

evidence relating to this transaction and outside the bounds of reason and probability.

The next preceding and only other transaction that could by any possibility have furnished to J. S. Kaufman grounds to suspect the solvency of Gustave Kaufman on August 4 was the meeting in January between J. S. and Gustave Kaufman and Joseph Keeling, as related in testimony (pp. 20 to 24 and 31).

Assuming that the evidence of Keeling was properly admitted, the knowledge brought to J. S. Kaufman thereby was simply that Gustave owed Keeling & Ridge for some stone delivered on his city contract and the latter wanted payment or a guarantee before making any further shipments. Gustave Kaufman then laid before Keeling and J. S. Kaufman the condition of his affairs, told how his work was going on, how much partly finished work he had for which he could get no estimates, and said he would see that Keeling & Ridge got their money.

Keeling testifies that he understood that J. S. Kaufman was to help financially, at least his language would bear that interpretation, but such interpretation is flatly contradicted not only by J. S. Kaufman, but also by his own subsequent conduct in continuing to ship large quantities of stone without asking J. S. Kaufman to obligate himself therefor in any way and without conferring with him or acquainting him even with the fact of the shipments being made.

In addition, J. S. Kaufman testifies positively that he proposed to do no more than the banking part of Gustave's affairs, and, for example, pay out the money, O. K. the bills, and look after the business in that way.

But this proposition, whatever it was, gave J. S. Kaufman no knowledge of Gustave's affairs, and there is not a trace of evidence that his proposal was accepted by Gustave or that J. S. Kaufman ever secured any knowledge of Gustave's affairs beyond that received in the presence of Keeling and which satisfied Keeling that he was safe in shipping much

more stone, caused him to increase the credits from $5,500 to over $13,000 without security, and, in fact, the solvency of Gustave was never questioned by either J. S. Kaufman or Keeling so far as the evidence shows. The acts of both of them subsequently demonstrate that fact. They are presumably reasonable men and with reasonable cause they would have believed Gustave Kaufman insolvent; yet both by frequent subsequent acts showed entire absence of such belief or even suspicion.

This occurrence was seven months before the alleged preference of August 4. It was six months before the bankrupt law came into existence. From the conference thenceforward J. S. Kaufman heard nothing to raise a suspicion in his mind that Gustave's affairs were not progressing favorably.

If we assume that some doubt was in his mind in January, caused by Keeling's demand for payment, the satisfactory termination of the conference followed by seven months of silence and apparent satisfaction of everybody—the work meanwhile steadily progressing—would of a surety have entirely dissipated all such doubts. The occurrence was too remote and disconnected from the payment of August 4 to have connected them in any way or suggested in the mind of a doubting Thomas himself that such payment was intended as a preference.

But while the testimony of Keeling was clearly insufficient to furnish reasonable cause to plaintiff in error to believe Gustave Kaufman insolvent then or afterwards, it is contended that this evidence should have been excluded and that its admission is ground for reversal.

The trustee offered to prove by the witness, Joseph Keeling, page 21:

(1.) "That in January, 1898, Gustave Kaufman, then being indebted to him in quite a large sum of money and his notes having gone to protest—that he declined to sell any more stone to Gustave Kaufman."

Under this offer, the witness testifies, *not* that notes had gone to protest, but that the note was not yet due. The witness' words are. top page 22, "For the reason that he had sent word to the office that the note which was to come due in a day or two that he would not be able to pay." On page 23, "A. This note of $2600 that was to come due in a day or two. Q. Who was to take care of that? A. Keeling & Ridge, and we were to receive a new note for the whole amount. Q. Did you receive a new note? A. Then I received a note for five thousand and some dollars."

(2.) He also offered to prove that they "there discussed the financial condition of Gustave Kaufman with both Gustave Kaufman and Joseph S. Kaufman, the defendant here." The testimony is as follows, page 22:

> "Q. What was said?
> "A. Well, we just talked about getting our money, that was all.
> "Q. What did you say about the matter of your money?
> "A. I said I would not ship him any more stone unless I would get my money or get some guarantee——
> "Q. When you said you couldn't ship any more stone, then what was said to you?
> "A. We talked the matter over about the conditions and so on of his work going on and how much he had lying idle and was not finished yet and couldn't get no estimates and so on, and I told him if we could make some satisfactory arrangements for the money we would ship; and he said that he would see that I would get my money after this and then I was to take care of his note that was to come due in two days."

This is a wide discrepancy between the offer and the testimony. They did not, as the offer proposed, discuss the financial condition of Gustave Kaufman. All they talked about was about getting money for Keeling & Ridge.

(3.) He also offered to prove "that Joseph Kaufman there told him that Gustave Kaufman was not a good financier, and that he was in bad shape financially, and that he, Joseph S. Kaufman, was going to take charge of his affairs."

(*a.*) *Not a word in this witness' testimony that Joseph S. Kaufman told the witness that Gustave Kaufman was in bad shape financially.*

(*b.*) Witness testified directly contrary to the offer, page 23:

> "Q. What, if anything, did Mr. Joseph S. Kaufman, say to you in connection with the business, or of his taking charge of the business?
>
> "A. *He did not say he would take charge of the business;* he said Gus didn't have much idea of financiering and handling the money question, and he was going to help him out on that point."

On page 24, on cross-examination, the witness says:

> "Q. In this conversation you had with Joseph about the financial end, what do you mean by the financial end?
>
> (Witness hesitates.)
>
> "Q. What I mean by that is, what did Joseph say?
>
> "A. He said that Gus did not look out for this money question, handling the financial end of the concern.
>
> "Q. That is, watching the books?
>
> "A. The money and pay-rolls and such things as that; and that he laid things around and would leave notes get overdue and so on, and he was going to take care of that.
>
> "Q. As book-keeper?
>
> "A. No; I understood him as money man; to help him out with his money matters.
>
> "Q. What did he say to you that led you to that impression?
>
> "A. Because he said that he would see that these notes were paid when they became due."

Note here that the testimony directly contradicts the terms of the offer in some parts and that in other parts there is no testimony whatsoever to sustain the offer.

(4.) He offered to prove that Joseph S. Kaufman "assured the witness that if he would continue to ship stone to him that he would see that it was paid; whereupon, the witness continued to ship stone until the month of June, accepting promissory notes for the same, upon the express promise of Joseph S. Kaufman that he would see that they were paid."

The witness testified, as above pointed out, in regard to what (he says) defendant said in regard to the payment of notes and shipping of stone, but we submit (*a*) that this would not prove, as the offer proposed, either the bankrupt condition of Gustave Kaufman or the knowledge of Joseph S. Kaufman of his bankrupt condition, or (*b*) that the witness relied upon that statement, if it were made, because he testifies at the end of his cross-examination, page 24, as follows:

> "Q. What did he say that led you to that impression?
> "A. Because he said that he would see that these notes were paid when they come due.
> "Q. And you continued shipping?
> "A. After that we continued shipments until the last payment was refused or we were notified that he went under.
> "Q. Well, you were satisfied with the explanation then made and you continued shipping?
> "A. Yes, sir.
> "Q. Did you get any of Joseph's endorsements?
> "A. No.
> "Q. You were satisfied with Gustave's notes?
> "A. I was satisfied with that after the conversation with him and from what I heard. I would do anything that was right and I expected that Gus would do the same thing at the time."

Leaving out of consideration for the purpose of this discussion the fact that J. S. Kaufman directly contradicted this testimony of Keeling's, page 31, we submit that Keeling's own testimony to the effect that he was satisfied with Gustave's notes without any endorsement from Joseph or any other person completely nullifies the offer that witness relied upon the oral statement and assurance of Joseph that these notes would be paid as a basis for extending further credit to Gustave. The testimony of the witness rebuts the terms of the offer completely and renders its purpose absurd and unworthy of consideration, and, from the viewpoint of evidence, the witness' testimony immaterial.

(5.) The offer was objected to as irrelevant and immaterial, as being too remote and having nothing to do with the question of whether or not, on the 4th day of August, Joseph S. Kaufman had reasonable cause to believe that at that time Gustave Kaufman was bankrupt and that the money he was then receiving was preferential within the meaning of the act.

(*a.*) The offer should have been rejected because it did not go to prove the bankrupt condition of Gustave Kaufman nor the knowledge of Joseph S. Kaufman of his bankrupt condition.

(*b.*) It was too remote. There is too much of a jump and too wide an interim between January, '98, and August, '98.

(*c.*) It was an offer to adduce incompetent, irrelevant, and immaterial testimony in that stage of the case, because it was not accompanied by an offer to connect it by means of intermediate circumstances with August 4, 1898, the date on which the alleged preference was made, and without such connection it needs no argument to demonstrate that the event or conversation of January, 1898, even if it was suffi-

cient to prove all that the plaintiff proposed it should prove, was too remote in time and effect to establish that in August, 1898, plaintiff in error received the payments alleged to be preferences with reasonable cause to believe that they were preferences.

The general rule of evidence applicable to this case is asserted in Commonwealth *vs.* Brown, 23 Sup. Ct. Pa., 470, in these words:

> "Where the relevancy of an offer of evidence depends on other facts not in evidence it should be accompanied by an offer to prove those facts in a subsequent stage of the cause."

Also in Marshall *vs.* Faddis, 199 Pa., 397, a case of conspiracy, where Mr. Chief Justice Mitchell says:

> "To make the declarations of an alleged conspirator admissible in evidence against his co-conspirators, there must be preliminary proof of the joint purpose and action, not necessarily conclusive, but sufficent to submit to the jury on that fact; * * * 'Sometimes for the sake of convenience the acts or declarations of one are admitted in evidence before sufficient proof is given of the conspiracy, the prosecutor undertaking to furnish such proof in a subsequent stage of the cause. *But this rests in the discretion of the judge, and is not permitted except under particular and urgent circumstances.*': (1 Greenleaf, sec. 111)."

Hill *vs.* Truby, 117 Pa. St., 320:

> "An offer of evidence must itself disclose all the facts which are necessary to establish its admissibility."

In order to entitle the trustee to recover in this case, he must prove that at the time when plaintiff in error received the alleged preferences, viz., on August 4, 1898, he then had reasonable cause to believe that he was receiving a prefer-

ence. This could not be established by proof that he had reasonable cause to believe that the bankrupt was in an insolvent condition in January, 1898. That period was too remote. Therefore the testimony of Keeling under the offer made was incompetent, irrelevant, and immaterial as being too remote. It follows that it should have been rejected unless—and this the trustee obviously failed to do—he also offered to connect that incident or conversation occurring in January, 1898, by successive events and circumstances with the event of August 4, 1898, the date of the alleged preference.

(6.) The effect of the testimony under the offer.—We have shown above (1) that in many respects the testimony was directly contradictory to the offer, and (2) that in many other respects the testimony does not sustain the terms of the offer, and (3) at that stage of the case and under the offer as framed was irrelevant and incompetent.

We now submit that Keeling's testimony was not sufficient to carry the case to the jury.

(a.) There was nothing in the conversation of January, 1898, to raise in the mind of plaintiff in error reasonable cause to believe that at that time Gustave Kaufman was insolvent. A note was coming due in a few days, and the conference was held between the witness Gustave Kaufman and J. S. Kaufman as to how that note was to be taken care of, Gustave Kaufman stating that he would not be able to pay it when it fell due. This would not indicate an insolvent or bankrupt condition, even if there had been at that time a bankruptcy law in effect. Under the bankrupt act of 1898, section 1, chapter 1, containing definitions, clause 15 defines an insolvent as follows: "A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property * * * shall not, at a fair valuation, be

sufficient in amount to pay his debts." Under the bankruptcy act of 1867, a person was deemed insolvent who could not pay his obligations as they matured, and therefore there is a very wide discrepancy and distinction between a condition of insolvency as determined by the present bankruptcy law and such condition as defined or determined by the former act.

So that, even if we are to be bound by the present bankruptcy law, which was not then enacted or in contemplation of the parties, the fact that Gustave Kaufman could not, as he declared, pay the note which was to fall due in two days after the January conversation did not render him insolvent as defined by the present bankruptcy law.

(*b.*) The testimony of the witness Keeling relative to his subsequent business dealings with Gustave Kaufman after the conversation which occurred in January completely refutes the effect which the trustee offered or proposed that it would establish. He offered this conversation for the purpose of showing (1) the bankrupt condition of Gustave Kaufman; (2) the knowledge of J. S. Kaufman of his bankrupt condition. It did not prove anything of the kind. There was nothing in the testimony relating to the amount of Gustave Kaufman's property at that time or the amount of his liabilities. He testified that they discussed at that meeting ways and means as to how Keeling & Ridge were to get their money. The result was Keeling & Ridge undertook to take care of the note which was about to fall due and took a new note from Gustave Kaufman for the amount of their entire debt, including the amount of note about to come due, without any endorsement or guaranty whatsoever, amounting to over $5,000, and subsequently continued to extend credit to him upon his personal obligations without endorsement or guaranty until at the time of the failure in August, 1898, the credits extended by them to him amounted to over $13,000. This result, we confidently submit, indi-

cates that this conversation satisfactorily established in the mind of the principal creditor that Gustave Kaufman was not in a bankrupt condition at that time; and if that was the result in his mind, it is reasonable to presume that it created at least as favorable an impression on the mind of the defendant.

(c.) When the defendant requested the court to give binding instructions in his favor he refused to do so, and, as it appears from his charge, he based this decision in part upon the testimony given by this witness, showing that he took this testimony into consideration and submitted it to the jury, and therein, we say, he committed an error.

We have, perhaps, given more space to the discussion of Keeling's testimony than its importance deserves. If held that its admission was proper it falls far short, aside from its remoteness, as we have shown, of furnishing reasonable grounds for belief that Gustave Kaufman, seven months later, was insolvent. But if, as we believe, it was improperly admitted, then it furnishes additional grounds for reversal, and if this court should hold that there was sufficient evidence to send the case to the jury on the question of reasonable cause to believe the debtor insolvent the improper admission of Keeling's testimony would yet entitle the plaintiff in error to a reversal.

It must be borne in mind that the transactions of January, May, July, and August 4, as recited in the testimony, were all the opportunities afforded J. S. Kaufman from which to judge of the solvency or insolvency of Gustave. In those transactions alone, disconnected and remote from each other as they were, must be found reasonable cause to believe him insolvent, or else such cause is not found at all, and we submit with confidence that, with or without the testimony of Keeling, there are in any or all of those transactions no words or acts that furnish a scintilla of evidence toward causing

the ordinarily reasonable, prudent business man to believe on August 4 that Gustave Kaufman was insolvent as defined by the present bankrupt act.

Hence it follows that the first proposition has been sustained, and that for errors of the trial judge, as sustained by the Superior Court, in not taking the case from the jury and in admitting incompetent testimony, the case should be reversed.

In support of this contention and as construing the terms "insolvent" and "reasonable cause to believe" and the amount of proof necessary to establish same, we append the following citations:

Perry *vs.* Booth, 80 N. Y. S., 706 (previously reported in Perry *vs.* Booth, 67 App. Div., 235):

> Plaintiff, trustee of Skead, bankrupt, claims that certain transfers of lumber made by Skead in November and December, '98, to defendants were violative of section 60 of the bankrupt act. In the former trial the findings of the court below that defendants had reasonable cause to believe that the transfers complained of were received by defendants with knowledge that preferences were thereby intended, were reversed and the appellate court reached the conclusion that the facts did not establish anything to indicate that the defendants had reasonable cause to believe that a preference was intended. It also found that the necessary inference from the facts was that no preference was, in fact, created by any of the transactions. We do not find that in the second trial any additional facts were disclosed to distinguish the case in any material degree from the one first presented. In Benedict *vs.* Deshel, 77 App. Div., 276, 79 N. Y. S., 206, the appellate division for the first department recently held that a transfer is not voidable under section 60 of the bankruptcy act unless it appears that the bankrupt was insolvent at the time that the transfer was made; that the transfer actually created a preference; that the bankrupt intended to create a preference; and that the creditor had reasonable grounds to believe that a preference was intended.

The contention on the part of counsel for appellant is, in effect, that, assuming the existence of insolvency, the existence of reasonable cause for the belief may be inferred from the mere demand for security. They say in the brief: "We submit that the creditor who demands security for a previously unsecured debt at once and by that act brings himself within the category of those who have reasonable cause to believe that they are getting a preference."

A different view appears to have been taken by the Federal courts. In Grant *v.* Bank, 97 U. S., 80, in considering the quite similar terms of the former bankrupt act, Mr. Justice Bradley said: "A man may have many grounds of suspicion that his debtor is in failing circumstances and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further; he may feel anxious about his claim and have a strong desire to secure it; and yet such belief as the act requires may be wanting. Obtaining additional security or receiving payment of a debt under such circumstances is not prohibited by the law * * * Hence the act very wisely, as we think, instead of making a payment or security void for a mere suspicion of the debtor's insolvency, requires for that purpose that his creditor should have some reasonable cause to believe him insolvent. He must have a knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinary intelligent man."

It has also been held under the present act that the giving of security for a past-due demand is neither sufficient to establish knowledge of insolvency nor to put the creditor upon inquiry. The court said in *In re* Eggert, 43 C. C. A., 1, 8; 102 Federal, 735, 742: "To hold that a creditor receiving payment of or security for a past-due debt is by the mere fact of knowledge that the debt is past maturity put upon inquiry of his debtor's inability to pay all his debts, and that, under such circumstances, he received payment or security at his peril, would be to put at hazard many business transactions and make the act oppressive. The fact of such inability coupled with other facts and circumstances brought home to the creditor

might be sufficient to put him on inquiry; but this being the only fact from which the deduction is sought that the creditor had reasonable cause to believe his debtor insolvent, standing alone, it is insufficient to raise an inference of law that the creditor is chargeable with knowledge of the facts which inquiry would have elicited."

Judgment of court below in favor of defendants affirmed.

Sirrine *vs.* Stover Marshall Co., 64 S. Car., 457:

Under the bankrupt act of '67, a transfer was invalidated if creditor had reasonable cause to believe a debtor *insolvent;* while under the bankrupt act of '98, a transfer is invalidated if the creditor has reasonable cause to believe it was intended as a preference. Under the bankrupt act of '67, insolvency existed when the debtor was unable to pay his debts as they became due in the ordinary course of his daily transactions; while under the act of '98, insolvency exists when the debtor's whole property at a fair valuation is insufficient in amount to pay his debts. The rule established by decisions of the U. S. Supreme Court as to meaning of words "reasonable cause to believe, etc.," under the act of '67 is applicable in determining the meaning of the words "reasonable cause to believe it was intended as a preference" under the act of '98, since a reasonable cause to believe a preference was intended by the debtor involves a reasonable cause to believe the debtor to be insolvent, as a preference depends upon insolvency. The rule is thus stated in Grant *vs.* Bank, 97 U. S., 80:

"It is not enough that a creditor has some cause to suspect the insolvency of his debtor, but he must have such a knowledge of facts as to induce a reasonable belief of the debtor's insolvency in order to invalidate a security taken for his debt. * * * He must have knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinarily intelligent man." To the same effect are Barbour *vs.* Priest, 103 U. S., 293; Stuckey *vs.* Bank, 108 U. S., 74; Toof *vs.* Martin, 13 Wall., 40; Hall *vs.*

Wagner, 16 Wall., 584; Buchanan *vs.* Smith, 16 Wall., 277; Dutcher *vs.* Wright, 94 U. S., 553; Bank *vs.* Cook, 95 U. S., 343. In the recent case of *In re* Eggert, 102 Fed., 735, the foregoing cases are considered and the rule applicable under the act of '98 was shown to be as follows:

"In determining whether the taking of a security by a creditor constitutes an illegal preference under the bankruptcy act of '98, section 60 (*b*), the creditor is not to be charged with knowledge of his debtor's financial condition from mere non-payment of his debts or from circumstances which give rise to mere suspicion in his mind of business insolvency. On the other hand, it is not essential that the creditor should have actual knowledge of or belief in his debtor's insolvency, but it is sufficient if he has reasonable cause to believe him insolvent. If facts and circumstances with respect to the debtor's financial condition are brought home to him such as would put an ordinarily prudent man upon inquiry, the creditor is chargeable with knowledge of the facts which such inquiry should reasonably be expected to disclose."

It would not subserve any useful purpose to discuss the testimony in detail, but considering it in the light of the principle stated, we agree with the court below that plaintiff failed to show that defendants, at the time of such payments, had reasonable cause to believe that such payments were intended as a preference for it was not shown that defendants or their agents had reasonable cause to believe that the assets of the bankrupts were insufficient to pay their indebtedness. The evidence shows that plaintiff, who was then acting as attorney for the bankrupts and who made said payments from the proceeds of a policy of fire insurance collected by him upon the order of the bankrupts, believed at the time that the bankrupts were solvent and so informed the agents of the defendants. Mr. S., agent for defendants, and Mr. McC., attorney for other creditors, both testified that they had no reason at that time to believe that the debtors were insolvent and no knowledge of any fact was brought home to them that should have put an ordinarily prudent man upon inquiry beyond such as they made of the plaintiff.

Harmon *vs.* Feldheim, 131 Mich., 470:

Bill by plaintiff, trustee of bankrupt, against defendants to set aside an assignment of collateral as a preference under the bankruptcy law. The bankrupts had been engaged in the banking business for more than thirty years, had a fine commercial rating and enjoyed a good standing in commercial circles. Defendant had been a depositor in the bank for five years. In July, 1900, he had three certificates of deposit, aggregating $27,000. Thirty days' notice was required before he could draw the money. He gave the formal notice on July 7, 1900, that he would require $17,000 in thirty days. At the end of that time bankrupts informed defendant that they could not pay the amount just then, and he then placed the matter in the hands of his attorney, co-defendant. The attorney examined into the affairs of the bank and consulted Mr. Don M. Dickenson, who was a depositor in the same bank and had an intimate acquaintance with the members of the firm. Defendant's attorney and other members of his family were also at the same time large depositors. The result of the negotiations was the execution on August 28, 1900, of the following agreement: (An agreement showing collateral security is then set forth wherein defendant appears to loan to bankrupts $25,000, and in consideration of that loan, certain collateral is assigned to him, the loan consisting of the money then on deposit to the defendant's credit.)

Held (after stating the facts and quoting section 60 (*a*) and (*b*): The sole question presented is, Did defendant and his attorney, acting for him, have reasonable cause to believe that debtors were insolvent, and did they make the assignment with the intent thereby to give a preference? The court below, in a written opinion, found that they did not. In this finding we concur. We deem it unimportant to set forth the evidence upon which the finding is based. We are satisfied that the defendants did not, at the time of the assignment, contemplate bankruptcy, and that both defendants had no information which led

them to believe, or which should have caused them to believe, that the firm was insolvent.

(NOTE.—The agreement above referred to contained the following recitals:

Whereas A. Ives & Sons are desirous of borrowing the sum of $25,000 from said Adolph Feldheim; and,

Whereas, the said Adolph Feldheim has on deposit the sum of $25,000 in cash now due and payable and subject to present withdrawal in currency; and,

Whereas, the said Feldheim is willing to lend said sum to A. Ives & Sons if satisfactorily secured concurrently with the making of said loan:

Now, therefore, etc., (assignment of collateral security follows).

Congleton *vs.* Schreihofer, 54 Atl. Rep. (N. J. C. App., 1903), 144. Opinion by Emery, V. C.:

Complainant, trustee in bankruptcy, filed this bill to set aside a conveyance made by bankrupt to defendant.

Second (p. 145). The trustee's right to recover the property from the creditor as an illegal preference is that, at the time of the conveyance, the debtor was insolvent, and the creditor or her agent had reasonable cause to believe that it was intended thereby to give a preference.

Proofs sufficiently establish that, at the time of the transfer, the debtor was insolvent, and the dispute on this branch of the case relates to the creditor having reasonable cause to believe that a preference was intended. * * *

(P. 146.) Creditor upon death of her husband, eight years ago, came into possession of a small sum of money, $500, which she loaned to her brother, the bankrupt, about two years after her husband's death. He was then carrying on business as a butcher in Newark. The loan was to be paid in six months, and a note for that period was given. It was not paid at maturity and a new note for another six months was given. This note was also renewed by a similar note, and the same course as to renewals was continued

down to 1896, when the last note for six months was given, and this was the note surrendered on receiving the deed. Interest was paid on the notes usually once a year and when the sister asked for it. For some time previous to July, 1900, when she received her last interest, Mrs. S., *on getting her interest from her brother, urged him to pay the money, but the brother did not do so, saying that he did not have the money then.* At this time he owned real estate in Newark, worth in all from $7,000 to $9,000 (or $1,000 to $3,000 above the mortgages), and also conducted a business in the market. The sister's urgency, from time to time, to pay the money borrowed, was not due to any apprehension on her part of his then or immediate insolvency, but to the fact that the money had been loaned so long and she wanted the money to lend to her daughter who had already some of her money on mortgage. *She urged him to sell some property and give her the money.* In July, 1900, when she came for her interest, she again urged her brother, as she said in the evidence in bankruptcy, "to give me the money or give me something that I can stand by." She said she did this because he had not given her any note for the "last couple of years." The brother then said, "I will give you the deed for my lots in the rear," and she says, "Of course I was then satisfied." Nothing appears to have been said at this time about the date for conveying the property and no further conversations took place in reference to the conveyance until after the deed was executed by the bankrupt, August 8, 1900, and left by him for record at the register's office. The deed was executed at the same time that he made several other conveyances and transfers, comprising substantially all his property, and he then stopped the business of marketing and it was continued by his sons, to whom he transferred it, in the same places where he had transacted business. The debtor evidently intended the conveyance as a preference to his sister, but he also intended it, I think, to carry out his promise made to her in July to convey the lots to her for her debt. She received the deed from the recorder's office after the adjudication in bankruptcy, and upon receipt of it, at once

delivered the note to her brother. At no time up to the delivery of the deed did she have any conversation with her brother about his debts to others, or about his financial condition, nor did she know that he had stopped business.

The complainant relied on a statement made by the debtor in the bankruptcy proceedings that he told her "she had better secure herself and take this deed for her note;" but whether this was in July when he paid the interest, or at the first interview after the deed was executed, is not clear from the debtor's statement, but this statement was not made by the bankrupt when examined on this hearing; and, as it was denied by the creditor, the statement of the debtor in his bankruptcy proceedings cannot now be considered against her as evidence given by her, or as evidence of the truth of the statement. *Nor does it, in my judgment, amount to such a statement by the debtor in reference to his financial condition as to charge her with reasonable cause to believe that he was then insolvent.* At the furthest, it could only give rise to a suspicion of insolvency, and suspicion is not reasonable cause for belief.

(The court then proceeds to discuss and reject the claim of complainant's counsel that the debtor was the creditor's agent in the execution and delivery of the deed, and that his knowledge of his own insolvency was chargeable to her.)

(The court then takes up the complainant's claim that the circumstances connected with the transfer were unusual and were such as to put the creditor upon inquiry as to her brother's financial condition, and that, having failed to make such inquiry, she is, therefore, chargeable with notice. These circumstances are that she agreed to take and did take the deed for the land without any examination of it by herself or counsel to see what it conveyed, or whether the title was good; that she does not know how many lots it conveyed, or their value, or whether it was encumbered. She left everything to her brother, she said, and did not ask or inquire into anything.) The circumstances show sufficiently, I think, that Mrs. S. relied entirely on her brother to carry out his agree-

ment to transfer the rear lots to her, and supposed he was doing so fairly and according to the spirit of his promise. This confidence the bankrupt abused by conveying only a portion of the rear lots and without informing her of this when he secured the delivery of his note. But her confidence in her brother was not unreasonable, nor, under the circumstances, do I think she was put on further inquiry. She knew what the rear lots were, in the ordinary meaning of the words, which she was entitled to accept; and her failure to make those inquiries about the title or encumbrances or descriptions which might be usual in case of purchase from a stranger, cannot be said in this case to be due to anything else than the confidence she placed in her brother that he was carrying out his promise in good faith. So far, therefore, as complainant's claim depends upon the creditor's belief or cause of belief that the debtor was insolvent, and a preference was intended, I conclude that no case has been made out by the trustee.

Netter, trustee, *vs.* Refowich, 12 Dist. Rep. (Pa.), 196:

October 7, '98, Moses R. gave to Morris R. a judgment note. October 17, '98, judgment entered on the note. Same day execution issued. October 19, defendant's personal property levied upon, and, on October 29, the same sold by the sheriff and the proceeds in part applied to costs of the writ and in part on the debt. November 14, '98, after the proceeds of the sale had been paid over, a petition to declare Morris R. bankrupt was filed against him, and on February 9, 1900, he was adjudged a bankrupt. January 10, 1901, this action was begun by the trustee against Moses R. to recover the amount paid to him, claiming that he had received a preference under sec. 60 (*a*) and (*b*) of the bankruptcy act.

The plaintiff rested after producing the foregoing testimony; and no testimony was introduced by the defendant; and a judgment was directed to be entered in favor of the plaintiff against the defendant for the amount of the claim.

Held: The question now is, did this defendant have

reasonable cause to believe that at the time the judgment was given, that it was given as a preference? It is incumbent upon the plaintiff, the trustee of the bankrupt, to establish this fact by testimony. * * *

From an examination of the testimony which is entirely that of certification of the records from the records of common pleas of Schuylkill county, and of the bankruptcy proceedings in the United States court, we are unable to conclude that these records are of a character that could have brought home in any way to this defendant knowledge that should have been of a nature to create in his mind a reasonable cause to believe that when Morris R. gave to him the judgment upon which his personal property was sold, that it was intended thereby to give him a preference. The testimony, in our judgment, was insufficient to submit to the jury for them to determine that, at the time of the giving of the note upon which judgment was entered, defendant had reasonable cause to believe that Morris R. was insolvent; and that, when the judgment was given to him, it was given as a preference to his other creditors. New trial granted.

The third and sixth assignments of error may be argued together under the

Second Proposition.

THAT IF THIS COURT SHOULD FIND THAT THE PAYMENT OF $1,086.64 WAS A VOIDABLE PREFERENCE, THEN THE PLAINTIFF IN ERROR IS ENTITLED TO A SET-OFF AMOUNTING TO $767.

Assuming for the argument that the first proposition falls, we have the case of one who, having knowingly received a preference, deliberately returns a portion of it in good faith extending further credit without any security whatever.

The plaintiff in error on August 8, four days after receiving the payment of $1,086.64 from the debtor, gave back at

debtor's request $767 with which to pay wages accrued All the testimony regarding this transaction appears at page. 33. At that date Gustave Kaufman had ceased work. "His trouble," as the witness terms it, had come on. The plaintiff in error then knew that Gustave was probably unable to pay his debts. With that knowledge and knowing he had already received a preference (under our assumption) he gave the debtor $767 in cash to pay labor claims, and no part of it has ever been repaid. Why cannot that sum be properly set off against the preference under clause (c) of said section 60 of the bankrupt act?

Let us analyze the terms of this clause and apply them to this transaction.

"If a creditor has been preferred"—we assume for the purpose of this argument that there has been a preference by reason of the payment on August 4.

"Afterwards"—payment August 4, set-off August 8.

"In good faith"—there is no doubt that the money was actually paid by plaintiff in error to debtor and its good faith is not attacked.

"Gives the debtor further credit"—he paid him the money. This is giving him further credit, just as much as if he was dealing with him in merchandise and had sent him more goods.

"Without security of any kind"—there is no doubt that plaintiff in error received no security for the advancement of August 8.

"For property"—money is property.

"Which becomes a part of the debtor's estate"—the debtor received the money. His petition in bankruptcy was not filed until August 20, 1898, and he was not adjudicated a bankrupt until August 27, 1898. Section 1 of the bankrupt act defines a bankrupt as follows: "Bankrupt shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed or who has filed a voluntary petition

or who has been adjudged a bankrupt." Now, it is very evident that until Gustave Kaufman filed his voluntary petition in bankruptcy he was not a "bankrupt." He was a "debtor" and he remained a "debtor" until his petition in bankruptcy had been filed. Therefore, when he received from plaintiff in error on August 8 $767, that money immediately became a part of his estate—that is, of the "debtor's estate." What he did with it or what he intended to do with it is immaterial. The testimony shows that he said that he needed the money to pay off his laborers. There is nothing in the testimony to justify any doubt but that he did apply the money for that purpose, but, whether he did or not, can make no difference. It is immaterial. As soon as he got it, it became his. It was his property, and it was necessarily then a part of his estate. We do not need to inquire whether or not the trustee, who was not appointed until January, 1899, found this $767 intact among his assets. That is not the test fixed by the bankruptcy act. The bankruptcy act does not say "bankrupt's estates." It says the "debtor's estates."

It is in the failure to distinguish between "debtor" and "bankrupt" that the trial court, as well as the Superior Court of Pennsylvania, erred. This is evidenced by the charge which, touching this matter, reads as follows (p. 42):

> "I am asked to charge with regard to an alleged set-off here. I do not see that there is any evidence which would justify me in saying that there is money that went into the estate of the *bankrupt* here. There is evidence that he paid some money that seems to have been appropriated to some other debts; but there is nothing which would justify a set-off, as I understand the testimony in the case."

And in his opinion refusing a new trial Judge McClung fell into the same error. He therein quoted the testimony and assumed as a matter of fact that Gustave Kaufman had received this money on August 8 from plaintiff in error. He

quoted this section of the bankruptcy act and still failed to distinguish between "debtor" and "bankrupt." He says (p. 45), "This $767.00 did not literally become a part of the *bankrupt's* estate. Evidence that the debtor got the money for another purpose certainly is not evidence that he turned it over to the trustee." Then he says because we didn't prove that this money was used by the debtor for the purpose for which he said he wanted it—that is, to pay wages—we didn't have the right to claim set-off. Now, in our theory of this case, what the debtor did with the money after he received it is utterly immaterial. Whether or not he applied it for the purposes for which he said he wanted it, cannot affect the rights of the plaintiff in error. He gave the debtor the money. The debtor received it. As soon as he got it, it was his property, and, as his property, it became and was a part of his estate. Hence, what he did with it or what he did not do with it is entirely immaterial, and the lower court erred in holding, as appears from his opinion, that the burden was upon us to prove that the money was used for the purpose claimed, and that, unless we did prove it, we were not entitled to the set-off.

The Superior Court of Pennsylvania took the same view and made the same error as did Judge McClung in the lower court. This phase of the case appears in the opinion of the Superior Court as printed in the record on pages 48 and 49. A very casual reading of this portion of the opinion will demonstrate that the Superior Court failed to discriminate between the term "debtor" and the term "bankrupt" and they affirmed the lower court practically upon the latter's opinion refusing a new trial.

If the $1,086.64 payment of August 4 is a voidable preference, then we submit that this $767 payment must be allowed as a set-off, because otherwise the plaintiff in error will be charged with a preference of $1,086.64, whereas, if there was any preference at all, it would be only as to the

difference between the latter amount and $767 repaid August 8, 1898, or $319.64.

Here, then, all the requirements of clause (*c*) allowing set-offs have been met, and it follows that it was error in the trial judge to refuse to allow the jury to pass upon the question of allowing the set-off, which error the Superior Court affirmed.

Third Proposition.

NO INTEREST IS ALLOWABLE ON ANY AMOUNT RECOVERED IN THIS ACTION.

This proposition covers the seventh assignment of error.

The trial court allowed interest on the amount of the alleged preference from August 11, 1898, to date of trial to be included in the verdict. The Superior Court struck off so much as had accrued prior to the commencement of the suit, holding such commencement to be a demand for payment, and that interest was recoverable from that date.

Clause (*b*) of section 60 of the bankrupt act confers only the right to recover the property or its value. Manifestly in this case the alternative "or its value" has no significance. Money is property and the money was recovered. The money was $1,086.64, not more.

The act itself does not provide for interest, nor is interest an incident to the claim which the trustee is permitted to litigate. He is not authorized to sue as for damages, but for the recovery of the very preferential thing itself. There is no amercement for retention. The transaction which resulted in the alleged preferential transfer is simply avoided and annulled, and the debtor's estate is thus reinstated in the position as to possession it would have been in had the preferential transaction not been entered into.

The statute might have provided that the recovery should include interest, or even damages or other penalty; it does

not. It simply and only looks to restoration, and does not seek to make money by a transaction lawful except for the statute. With this construction, upon recovery the trustee is vested with the precise estate he would have had if the transaction had never been entered into, and, having that estate, the trustee could not put it to usance. Suppose the preference to have consisted of fixtures, still remaining in kind, could the recovery thereof have also included interest for the detention? Not, it seems to us, under the words of the statute, and, if not in such case, why recover anything more than its value?

Collier on Bankruptcy (3d edition, p. 369):

> The right given to the trustee to recover the property or its value is, in effect, a right to maintain replevin for specific property or trover for the conversion of the same.

The trial court did not, in his instructions to the jury, authorize them to add interest to the amount of the preference. They did so of their own volition. The Superior Court fell into error in treating the preference as an ordinary debt. To allow any interest whatever there must be read into the act something more than its plain and lucid wording signifies.

Respectfully submitted,

JOS. A. LANGFITT,
WM. KAUFMAN,
Attorneys for Plaintiff in Error.

EXHIBIT 6.

For value received, I hereby sell, assign, transfer and set over unto Joseph S. Kaufman, Sol Kaufman, Emanuel Kaufman, Sydney L. Kaufman and William Kaufman, their heirs and assigns, all that certain contractor's plant now being used by me in the construction and paving of part of Beechwood boulevard, Twenty-third ward, Pittsburg, and consisting of the following pieces of machinery and tools:

1 Russell roller, 12½ tons; 1 5 x 8 Lidgerwood hoisting engine; 2 derricks and fittings; 3 wire-rope blocks (one-horse power); 1,200 feet of ⅝-inch wire rope; 2,000 feet 1-inch wire rope; 1 electric motor and conveyor; in Winckler street sprinkler; 6 wooden blocks; 1 15-ton Dudgeon hydraulic jack; 1 15-ton jack; 10 contractor's dump cars; 2½ miles of track; three-foot gauge, including rails, ties, splice-bars, spikes, bolts, frogs and switches; a lot of picks, shovels, hammers, wheelbarrows, track and quarry tools; 1 wheeled scraper; 1 Wells light; 1 engineer's transit instrument and tripod; 1 engineer's level instrument and tripod. And I also hereby sell, assign, transfer and set over unto the above-named assignees, their heirs and assigns, all office furniture and paraphernalia, including books, maps, plans, drawings, typewriter and furniture contained in office rooms 808 and 809, Hamilton building, Fifth avenue, Pittsburg.

And I do also hereby sell, assign, transfer and set over unto the above-named assignees, their heirs and assigns, all my right, title, interest, claim and demand, whatever the same may be or amount to, of, in and to the household goods, furniture and effects of every kind, sort and nature contained in the house No. 644 Maryland avenue, Pittsburg, subject, however, to the title and claim of my wife to the said household goods, furniture and effects, she being the sole and absolute owner thereof.

This assignment is made for the purpose of indemnifying said Joseph S. Kaufman for his liability as endorser for me on a promissory note for $3,000 to N. Holmes & Sons; and for the further purpose of indemnifying all of the aforesaid assignees for their liability as endorsers for me on a certain promissory note for $6,000 due the Second National Bank of Pittsburg, it having been agreed that this assignment be given on the date of the last-mentioned indorsement.

In the event that I do not pay the said notes and the liability of the said assignees as endorsers shall thereby become absolute, I hereby consent and authorize them, the said assignees, to at any time after their liability becomes absolute, without further notice to me, sell the property hereby assigned, either at public or private sale, and to apply the proceeds thereof, after deducting all reasonable costs and expenses, to the debt hereby secured; and in the event that at such sale the sum realized shall exceed the amount of the debt hereby secured, then the residue, after deducting all costs and expenses, shall be returned to me.

Witness my hand and seal this 30th day of June, 1898.

(Signed) GUSTAVE KAUFMAN. [SEAL.]